In The

Supreme Court of the United States

October Term, 1972

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No. 73-3

ALBERT GOLDSTEIN, ALFRED CAESAR, SAM JACOBSON, MURRAY GELLER, AND ROBERT WISCH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion and Judgment of the Court of Appeals 1a

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioners pray that a writ of certiorari issue to review the judgment and opinion entered on May 23, 1973 by the United States Court of Appeals for the Second Circuit in the proceedings entitled United States of America, Appellant v. Albert Goldstein, et al, Appellees.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix at page 1a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 25, 1973 and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Whether the holding of the Court of Appeals, in conflict with the holding of the Court of Appeals for the Ninth Circuit, that a Government appeal lies from a District Court's dismissal of an indictment on the grounds of double jeopardy was correct.

2. Whether reprosecution after the District Court sua sponte dismissed the jury for disagreement without inquiry of the jury or consultation with counsel, constitutes double jeopardy.

Statutory Provisions

Title 18, United States Code, §3731 states in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from --- an order of a district court dismissing an indictment --- except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Statement of the Case

The petitioners were tried before the United States District Court, E.D.N.Y. (Judd, J) and a jury on twenty counts of an indictment and a superseding information charging a conspiracy and substantive offenses against the internal revenue laws in violation of 18 U.S.C. §§371 and 2 and 26 U.S.C. §§7201 and 7206.

The gravamen of the alleged offenses was that various corporations evaded payment of their income taxes by deducting certain salaries as expenses on the corporation's income tax returns which were paid to the defendants whom the Government alleged performed little or no services for the corporations named.

At the end of the Government's case the defendant Kessler was granted a judgment of acquittal, counts 16 and 19 were dismissed against the defendant Goldstein, and counts 17 and 18 were dismissed as to the defendant Jacobson. At the end

of the entire case count 2 was dismissed as to the defendant Caesar (A 6 & 7).[1]

On October 5, 1972 after a five week trial, the jury retired at approximately 12 noon, to deliberate on 49 separate verdicts involving five defendants and seventeen counts of the indictment and one count of an information. At 3:25 P.M., after a lunch recess, the testimony of two prosecution witnesses was read, at the jury's request. When the reading of that testimony was concluded, the Court recessed at 4:58 P.M. and excused the jury from further deliberations on that day.

The following day, October 6, 1972, the jury deliberated from 9:30 A.M. (A31) until 11:30 A.M. when they requested the Court's entire charge to be reread (A34-35). Juror No. 2, Mrs. Rappaport, also requested the Court's charge to be given to the jury in writing (A35).

After a delay of approximately one hour, awaiting a transcript of the charge to be prepared, during which time the jury was excused to the jury room, the Court re-read its instructions from 12:45 P.M. until approximately 1:45 (A36-44). During the reading of the charge Juror Rappaport requested a re-reading of the indictment (A37).

At 3:10 P.M. on the same day the Court received the following note from the jury:

"The jury apparently is not able to reach

1. The letter "A" refers to the Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

> a unanimous verdict on any count except number 20. Please advise (A47)."

After consulting with counsel the Court delivered a supplemental charge in which he advised the Jury to adhere to their conscientious convictions but not to hesitate to re-examine their own views, consult with one another and deliberate with a view to reaching agreement without doing violence to any individual judgment (A51).

After the jury retired at 3:15 P.M. certain defense counsel moved for a mistrial on the ground that the note from the jury indicated there was a deadlock which appeared to one counsel to be apparently hopeless at that time (A52-53). The Court denied that motion stating that "I think that they should be permitted to continue" (A53).

Less than two hours later at approximately 5:00 P.M. a second note was received stating:

> "I'm sorry to say that after reviewing most of the testimony and using what arguments and persuasion we could bring to bear, Mrs. Rappaport has insisted that under no circumstances can she vote guilty on any of the counts" (A56). (Emphasis added)

Immediately after reading the Jury's note to counsel the Court said:

> "I think that means a disagreement on seventeen counts. We will bring the jury in and see" (A56). (Emphasis added.)

The jury then entered and the following ensued:

> Court: "Mr. Fisher, I have your note which I gather indicates there is still disagreement on all but one count. Will you read me the count on which you have reached a verdict."
>
> The Foreman: "Your Honor, we, the jury find on count twenty defendant Albert Goldstein not guilty."
>
> The Court: "Do you want the Jury polled, Mr. Pollack?"
>
> Mr. Pollack: "Please, your Honor" (A56-57).

After the Jury was polled the Count continued.

> The Court: "and it's clear that you are in disagreement on the rest of the counts?"
>
> The Foreman: "I am afraid so" (A58)

As the Court of Appeals criticized without any consultation with counsel or proper inquiry of the Jurors, and without affording opportunity for counsel to be heard, the trial Court continued:

> The Court: "I appreciate the time you have put in, the effort that's been made. I might have given a more co-

ercive charge, but I thought it was improper. I think we should respect the conscience of anybody on the Jury.

I would like to keep you for five or ten minutes just to give you a little picture of things behind the scenes. You are entitled to wonder about what happened at all these side bars, and this has been only an income tax case. But it has been an important case for everybody.

You have heard some of the best defense counsel in this City in the last five weeks. The Government attorney is not an ordinary assistant U.S. attorney. He is from the section on Organized Crime of the Department of Justice. We have kept that title out so that it wouldn't in any way prejudice the defendants in this case.

Mr. Goldstein was going to put in character testimony, but in discussions about what they might be asked on cross examination, I said I would allow questions with respect to whether he had large gambling debts, and whether that was known to the character witnesses, and I think I was confirmed in feeling that that was a matter bearing on credibility because Mr. Jacobson's counsel asked you, when he submitted his income tax returns to the Jury, to block out the portions under income that showed some of his other income came from gambling.

I dismissed the count as to Mr. Kessler because he seemed to me to have worked so clearly that a reasonable juror must have had a reasonable doubt on him.

But one of the facts that was not in the record was that Mr. Kessler went off the payroll of Jolly shortly after he was arrested on a hijacking charge. He was not convicted on that because he is now in jail in New Orleans on a charge of illegally dealing in firearms.

You may or may not have noticed that there was a Marshall sitting beside him in the Courtroom all the time. I am sure he didn't run away. We tried to have him as inconspicuous as possible so you would not regard that as prejudice to him or to anyone else.

You heard references to Brady exhibits from time to time. The Government is required under a case called Brady against Maryland to give the defendants in a criminal case any evidence that is in Government files that would tend to show the innocence of the defendant, or to contradict Government testimony and those were some of the things that were brought forward.

In the Jolly bankruptcy, where I read the Court file, it appeared that Mr. Goldstein said that the reason why the company went into bankruptcy was because two of

the original principal stockholders had left and taken away a lot of business, and I don't know whether that means statements or not.

I kept out the testimony from Mr. Stachman that he had been threatened by Mr. Kessler and Mr. Goldstein if he did not keep doing business with Jolly.

The reason I reversed myself in that Himmelstein statement about when Mr. Seidemann was on the stand was that I thought the statement would be admissible if Mr. Himmelstein came and might as well avoid it.

Mr. Pollack: May I respectfully request we may have gone far enough and dismiss the Jury? They have been here long enough" (A59, 60, 61).

Thereafter each defense counsel took exception to the Court's remarks and moved to dismiss the indictment (62-67). The case was reassigned to the Honorable Jack Weinstein for retrial. Thereafter, that Court granted the defendant's motion to dismiss the indictment on the ground of double jeopardy.

Reasons for Granting the Writ

Point I

THE COURT OF APPEALS ERRED AND WAS IN CONFLICT WITH ANOTHER CIRCUIT ON AN IMPORTANT FEDERAL QUESTION IN HOLDING THAT THE DISMISSAL OF THE INDICTMENT WAS APPEALABLE.

The District Courts (Weinstein, J) order which the Court of Appeals held was appealable under 18 U.S.C. §3731 provided in pertinent part:

> "Ordered that the indictment numbered 72 CR 18 against Albert Goldstein, Alfred Caesar, Sam Jacobson, Murray Geller and Robert Wisch is hereby dismissed on the ground that re-prosecution of the defendants herein is barred by the double jeopardy provision of the Fifth Amendment to the United States Constitution" (A26).

Section 3731 of Title 18, as amended January 2, 1971, provides in pertinent part that:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from... an order of a district court dismissing an indictment... except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." (Emphasis added.)

We submit that the Court of Appeals, in holding the order appealable, erroneously decided an important question of federal law which should be corrected or at least settled by this Court.

Reasons for Granting the Writ

We contend that the precise statutory language and legislative intent precluded the Government from appealing. The conference report, (91-1768) 1970 U.S. Code Congressional and Administrative News, 5848 supports our contention:

> "The Senate amendment contained provisions not in the House bill which amended the Criminal Appeals Act, section 3731 of Title 18, United States Code, in the following significant respects:
>
> 1. Technical distinctions in pleadings as limitations on appeals by the United States were eliminated and in their place the Government was authorized to appeal any decision or order terminating a prosecution except an acquittal.
>
> * * *
>
> The conference substitute conforms to the Senate amendment except that it provides that an appeal by the United States shall lie to a court of appeals from a decision judgment or order of a district court dismissing an indictment or information as to any one or more counts, but that no appeal shall lie in any case in which the Double Jeopardy Clause of the United States Constitution prohibits further prosecution." (Emphasis added.)

Accordingly, it seems clear, that although the Senate's amendment would have authorized the Government to appeal "any decision terminating a prosecution except an acquittal" that version was specifically rejected in favor of the broader restriction precluding appeals in "any case in which the Double Jeopardy Clause of the United States Constitution prohibits further prosecution". If the conference substitute of the Senate Amendment, which was of course adopted, is to have any meaning, it seems obvious that Congress intended to bar the Government from appealing dismissals based upon Double Jeopardy.

This Court has frequently stated that the "exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified" United States v. Borden Co., 308 U.S. 188, 192. See also United States v. Keitel, 211 U.S. 370, 399; United States v. Dickinson, 213 U.S. 92, 103; Carroll v. United States, 354 U.S. 394, 400, where the Court declared that "appeals by the Government in criminal cases are something unusual, exceptional, unfavored." Such appeals are disfavored, it was explained in Will v. United States, 389 U.S. 90, 96 in part because they always threaten to offend the policies behind the double-jeopardy prohibition." Although the present section 3731 provides that "The provisions of this section shall be liberally construed to effectuate its purposes", a finding that the Government has the right to appeal the instant case would necessitate an abandonment of the expressed statutory purpose that "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution".

Congress did not intend an appeal under the facts herein, as evidenced by its specific rejection of the Senate's version of the bill. We submit that Congress and Congress alone has the power to legislate and that the decision of the Circuit Court of Appeals usurped that legislative function.

Furthermore, the District Court's ruling that prosecution is barred foreclosed the issue. As was stated in United States v. Oppenheimer, 242 U.S. 85, 87 (1916).

> "Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law, and one judgment that he is free as a matter of substantive law is as good as another."

Accordingly, in the instant case, the District Court's decision that further prosecution is barred is, as a matter of substantive law, tantamount to an acquittal.

Moreover, we contend that the Second Circuit's decision herein is apparently in conflict with the Ninth Circuit's decision in United States v. Hill, ___F.2d___(9 Cir. 1972). There, the trial judge dismissed an indictment charging obscenity on a pre-trial motion after receiving the erotica in evidence and holding it non obscene as a matter of law. The Government sought a writ of mandamus. The Court of Appeals held that, whether or not the judge was wrong, since jeopardy attacked the

newly amended Criminal Appeal Act 18 U.S.C. §3731 bars both the Government appeal and a mandamus designed to serve the same purposes. In reaching that result the Court said:

> "The Criminal Appeals Act, as amended, 18 U.S.C. Sec. 3731 permits the Government to appeal in certain cases except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution or 'after the defendant has been put in jeopardy.' Because we are of the opinion that the real parties in interest have been put in jeopardy, we hold that the Government has no right to appeal."

Point II

RETRIAL OF THE DEFENDANTS AFTER THE SUA SPONTE DISCHARGE OF THE JURY WITHOUT INQUIRY OR CONSULTATION WITH COUNSEL CONSTITUTES DOUBLE JEOPARDY.

We contend that the Circuit Court of Appeals reversal of the District's Courts dismissal of the indictment was incorrect and contrary to the weight of authority.

The District Judge assigned to retry the case dismissed the indictment on the ground that reprosecution of the defendants was barred by the double jeopardy provision of the Fifth Amendment to the United States Constitution in that the case was improperly taken from the Jury after the first trial.

In reaching that result, the District Court reasoned as follows:

> The Court: "I have gone over all of the transcript and other material and I am particularly impressed with the transcript of October 6, 1972 at 5:00 o'clock P.M.
>
> The Court said that there is 'still disagreement on all but one count.' There is no indication that that disagreement was fixed or that there could not be some agreement had there been further consultation. There were 18 counts undisposed of at that time. Many of them involved a number of defendants and all of them involved at least two defendants.
>
> The Jury was then polled on Count 20 and the defendant in that count was found not guilty. There's no inquiry made by the Court as to whether the Jury wished to consult further with each other. There is no indication that they disagreed with respect to each defendant on each count. In fact, it is not clear that they had considered in any detail each defendant as to each count.
>
> Immediately after the Jury was polled, the Judge began to address the Jury and there would be nothing from which their counsel could determine the nature of the remarks that would be made up until line 15 of page 6 of the transcript. Then

reference is made to the organized crime section of the Department of Justice. Thereafter very quickly there is reference to highly prejudicial material which undoubtedly had taken counsel by surprise and it would only be at that point I would think that the normal practice was not going to be followed, that inquiry was not going to be made to the Jury with respect to whether they might possibly reach an agreement given more time or whether they might possibly reach an agreement on any of the Counts as to any of the defendants.

It may well be that the Court properly determined at that point that it was unlikely an agreement would be reached with respect to every count and every defendant, but it is quite possible that they might have reached agreement with respect to some of the defendants as to some of the counts or they might have preferred to have more time.

The case took five weeks to try, was very complicated and they had been deliberating only eight hours.

I must reluctantly conclude that the Court acted without proper consultation with the attorneys and without proper consultation with the Jury and that the case was improperly taken from the Jury at this point without the consent of the defendants and before it had been deter-

> mined that no agreement could be reached.
>
> Under the circumstances, therefore, I reluctantly find that the defendants should be placed in double jeopardy if they were to be tried and dismiss the case as to all defendants." (A122-124)

We submit that the District Court's decision was proper under the facts herein and should have been affirmed.

As the Court below found the trial lasted five weeks, involved very complicated issues and the Jury had been deliberating for only eight hours (A124). When the trial Court read the last jury note which stated:

> "I'm sorry to say that after reviewing most of the testimony and using what arguments and persuasion we could bring to bear, Mrs. Rappaport has insisted that under no circumstances can she vote guilty on any of the counts."

defense counsel realized that they had a favorable jury and that at worst there would be a hung jury (A86, 89). At that point counsel decided they did not want a mistrial (A90, 103). Counsel, however, was not consulted at this point nor were counsel made aware that the Court intended sua sponte to dismiss the Jury without inquiring as to whether, given more time, the Jury could reach an agreement on any of the counts or as to any of the de-

fendants on a particular count. After the trial court read the note to counsel, the Court said:

> "I think that means a disagreement on seventeen counts. We will bring the jury in and see" (A56).

The Jury was returned to the courtroom and reported its verdict of not guilty on count 20. Each juror was then polled on that verdict. On completion of the polling the Court said:

> "And it's clear that you are in disagreement on the rest of the counts."

The foreman, without consultation with the other members of the jury, replied:

> "I am afraid so" (A58).

Immediately after this exchange the Court began its "behind the scenes dissertation". By that dissertation, the Court effectively discharged the Jury without consulting with or giving counsel an opportunity to be heard, nor was any inquiry made by the Court of the Jury as to the possibilities of an agreement on any of the remaining 48 verdicts. The Court did not attempt to ascertain whether the Jury was hopelessly deadlocked nor whether further time or instructions would be of assistance to it. Moreover, the Court did not inquire whether the Jury was or might be able to reach a verdict with respect to a particular defendant or any of the defendants with respect to a particular count if given further time and/or instructions. The Court did not give the Jury an opportunity to express any

desires with respect to further deliberations. Certainly a trial of five weeks duration, covering over 4300 pages of transcript, warranted at least such minimal inquiry.

The Jury's note establishes that it only had "reviewed most of the testimony" (underscoring supplied) but it had not yet exhausted its review of all of the evidence. Equally obvious is the fact that if, after eight hours of deliberation any juror entertains a strong, or even a seemingly unrelenting conscientious judgment either in opposition to or in favor of acquittal, sufficient reason is not shown thereby for the sua sponte declaration of a mistrial in a case which lasted five weeks and involved 49 possible verdicts. It is quite possible that if instructed to resume deliberations, the Jury might have, as the District Court found (A124), been able to agree as to a verdict with respect to one or more defendants within particular counts. It is significant that the Jury's note speaks only of "counts" and not particular defendants, and likewise the Court's inquiry of the foreman does not extend to individual defendants, but only as to "counts". There were, after all, 49 possible verdicts. It is simply unbelievable that the Jury had the opportunity to consider individually each of the 49 verdicts in less than eight hours. An arithmetical calculation shows that this would permit less than ten minutes for deliberations per verdict.

Under United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) a trial court has discretion to discharge a jury prior to verdict but, that

discretion is far from unfettered for as the Perez court states at 580, the trial court must take "all the circumstances into consideration" and determine whether "there is manifest necessity for the act or the ends of public justice would be defeated". See also Illinois v. Sommerville, 12 CR L3169 Supreme Court, February 27, 1973 No. 71-692; United States v. Jorn, 400 U.S. 470, 480-481 (1971); Gori v. United States, 367 U.S. 364, 367-369 (1961): Downum v. United States, 372 U.S. 734, 735, 736 (1963).

Moreover, United States v. Jorn, supra, and Downum v. United States, supra, also stress that the trial court should keep in mind that the purpose of the Double Jeopardy Clause is to protect the defendants from continued exposure to embarassment, anxiety, expenses, restrictions on his liberty as well as to preserve his "valued right to have his trial completed by a particular tribunal". United States v. Jorn, supra, at 484 quoting from Wade v. Hunter, 336 U.S. 684 (1949):

> "In the final analysis the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendants of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate" United States v. Jorn, supra at 486.

Under the facts of the instant case, it is clear that there was no "manifest necessity" or showing that "the ends of justice would be defeated" unless

a mistrial was granted. The Jury deliberated only eight hours on a trial that lasted five weeks. There was no inquiry as to whether further deliberations would be helpful in reaching a verdict as to any individual defendant on any count. The Court failed to consult with counsel as to possible alternatives. The Court failed to inquire as to whether the Jury was hopelessly deadlocked. The foregoing factors were considered relevant and important by the Court in United States v. Lansdown, 460 F.2d 164 (4 Cir. 1972) in deciding that there was no manifest necessity for declaring a mistrial in a case that lasted one day after the Jury deliberated for eleven hours.

The American Bar Association Project on Minimum Standards for Criminal Justice, Approved Draft 1968, provides at Section 5.4 (c):

> "The Jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement".

The commentary to this section includes the following guidelines at pages 156 and 157; questioning the Jurors, considering the circumstances of the case, the length of deliberation, the length of the trial and its nature and complexity.

As to the circumstances of this case, it may fairly be said that the case was not free from doubt. In fact the trial court itself states that "I don't know what I would do if I were a juror in the case" (Tr.3627-3628).

It is clear that this was a very complicated case as the District Court found (A124). The indictment covered six years, involving 17 tax returns of four different corporations for different fiscal years and five defendants, employed by one or more of the corporations at different times during the six-year period. In addition, it involved two personal tax returns of one of the defendants.

We submit that in light of the above cited authority it seems clear that the declaration of the mistrial in the instant case was wholly without manifest necessity and did not serve the ends of justice. Moreover, we submit that the trial court did not consider that the purpose of double jeopardy clause is to protect the defendant from continued exposure to embarassment, anxiety, as well as to preserve his valued right to have his trial completed by a particular tribunal, as is required by United States v. Jorn, supra, and Downum v. United States, supra.

Each of the defendants experienced considerable expense during the trial not only by the cost of their defense but also by the loss of income before and during the trial. From the date of indictment, each was subjected to embarrassment and interference with their businesses or occupations. Each was also compelled to live in a continuing state of anxiety.

After learning of the contents of the Jury's note each of the defendants knew that at least one of the Jurors was steadfastly convinced of his in-

nocence. For this reason, each believed that his case was before a jury "favorably disposed to his fate" but the defendant's option to proceed to a verdict was foreclosed without his consent.

The Court of Appeals position that the mistrial was proper because the defense had earlier moved for a mistrial and because Juror Rappaport had told Judge Judd, in the absence of counsel the day before, that she felt "incapable", is unsupported by the record.

As far as the motion for the mistrial, it is obvious from the record that counsel changed their positions and decided not to move for a mistrial after the note was received stating that Juror Rappaport would, "under no circumstances" vote guilty on any count (A86, 89 & 103). The District Court questioned each counsel on this point and apparently was convinced that counsel had changed their positions (A86 - 103). Furthermore, as the District Court concluded, counsel was taken by surprise at the trial court's remarks after the note was received (A123) and that the trial court acted without proper consultation with the attorneys (A124).

Accordingly, we respectfully submit that the District Court's dismissal of the indictment was erroneously reversed by the Circuit Court of Appeals.

Conclusion

For these reasons a Writ of Certiorari should be issued to review the Judgment and Opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 796—September Term, 1972.

(Argued April 19, 1973 Decided May 25, 1973.)

Docket No. 73-1165

UNITED STATES OF AMERICA,

Appellant,

—against—

ALBERT GOLDSTEIN, ALFRED CAESAR, SAM JACOBSON, MURRAY GELLER and ROBERT WISCH,

Appellees.

Before:

CLARK, *Associate Justice,**
WATERMAN and FEINBERG, *Circuit Judges.*

Appeal by the United States under 18 U.S.C. § 3731 from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *J.*, dismissing an indictment.

Reversed.

MICHAEL B. POLLACK, Attorney, Department of Justice (Dennis E. Dillon, Attorney, Department of Justice; Robert A. Morse, United States Attorney for the Eastern District of New York; L. Kevin Sheridan, Assistant

* Retired Associate Justice of the Supreme Court of the United States, sitting by designation.

United States Attorney, on the brief) *for Appellant.*

THOMAS J. O'BRIEN, New York, N. Y (Kostelanetz & Ritholz, James M. La Rossa, Joseph E. Brill, on the brief) *for Appellees Goldstein, Caesar, Jacobson and Geller.*

JEROME LEWIS, New York, N.Y. (H. Elliot Wales, on the brief) *for Appellee Wisch.*

FEINBERG, *Circuit Judge:*

The United States seeks to appeal from a pre-trial order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *J.*, dismissing an indictment against appelles on the ground that a mistrial declared in a prior trial on the same indictment was unwarranted, and that reprosecution would violate the double jeopardy clause of the fifth amendment. Under the recently amended Criminal Appeals Act, 18 U.S.C.A. § 3731 (1972-73 Supp.), the Government may appeal from an

> order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

We thus must answer two questions. First, does the language of section 3731 prevent an appeal by the Government? And second, was Judge Weinstein correct in holding that the double jeopardy clause barred a second trial? For reasons which follow, we conclude that an appeal does lie to this court from the order below, and, further, that the indictment was erroneously dismissed. Accordingly, we reverse and remand for further appropriate proceedings.

I

On January 7, 1972, appellees were indicted in the Eastern District of New York, on 20 counts charging various violations of federal internal revenue laws, 26 U.S.C. §§ 7201, 7206, and conspiracy to violate those provisions.[1] Trial commenced on September 5, 1972, before Judge Orrin G. Judd. Jury deliberation began on the morning of October 5.[2] The jury was excused for the evening after failing to reach a verdict with respect to any defendant on any count. That evening, Judge Judd had a brief exchange with Juror No. 2 (Mrs. Rappaport), which he related to counsel after jury deliberation had recommenced the following morning. As he explained it, she had asked to see him "on a personal matter." The judge had observed her "sniffling" and "quite ill at ease during the day" and he "started commiserating with her on her illness." She replied that she was "all right" but just felt "incapable."

At 11:30 A.M. on this second—and last—day of deliberation, the jury requested and received a re-reading of the charge. At 3:10, the jury sent a note to the judge stating it was

> apparently not able to reach a unanimous verdict on any count except number 20. Please advise.

In discussion with counsel, the judge indicated that he intended to tell the jury to deliberate "another couple of hours," but doubted that he would ask them to come back on Tuesday.[3] Defense counsel first objected to

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1 Count 5 of the indictment was later dismissed and was replaced by a superseding information.

2 At the outset, the jury's deliberation involved 18 counts, defendants having successfully moved for acquittal on counts 16 and 19.

3 The second day of deliberation was a Friday. Monday, October 9, 1972 was Columbus Day.

> your Honor saying that they should be returned for deliberation for a couple of more hours because it may well be that what that amounts to is an incarceration against their will

and then pointed out with respect to requiring the jury's return on Tuesday:

> There would be Friday night, all day Saturday, all day Sunday, all day Monday. So there would be three full days and four nights of separation during which it would be impossible to avoid pollution of the jury . . . .

Judge Judd then called the jury back into the courtroom and told them that he would ask them "to go back and to consider further and tell me whether further deliberation would be useful," although he pointed out that he did not intend to have them stay "late tonight" or return on the following Tuesday. He then gave what the Government accurately describes as a modified "Allen charge." Thereafter, defense counsel moved for a mistrial on the ground that the jury was in "deadlock, which apparently is a hopeless one." The motion was denied.

At approximately 5 o'clock, the jury foreman sent a second note, which said:

> [A]fter reviewing most of the testimony and raising what arguments and persuasion we could bring to bear, Mrs. Rappaport has insisted that under no circumstances can she vote guilty on any of the Counts.

Judge Judd thereupon stated his view that this meant "a disagreement on seventeen counts" and resolved to "bring the Jury in and see." The jury was brought in; they announced a verdict of not guilty on count 20, involving only appellee Goldstein, and were polled at the

Government's request. The judge then asked: "And it's clear that you are in disagreement on the rest of the counts?", to which the foreman replied "I am afraid so." The judge then continued:

> I appreciate the time you have put in, the effort that's been made. I might have given a more coercive charge, but I thought it was improper. I think we should respect the conscience of anybody on the Jury.
>
> I would like to keep you for five or ten minutes just to give you a little picture of things behind the scenes. You are entitled to wonder about what happened at all these side bars, and this has been only an income tax case. But it has been an important case for everybody.
>
> You have heard some of the best defense counsel in this City for the last five weeks. The Government attorney is not an ordinary assistant U.S. Attorney. . . .

The judge then went on to disclose, among other things, that the government attorney was from the Organized Crime section of the Justice Department, that defendant Goldstein's tax returns disclosed income from gambling, and that certain defendants had threatened a witness prior to the trial. Counsel took vigorous exception to these comments—a concern which we share—and moved to dismiss the indictment. The motion was denied.

The case was set for retrial before Judge Weinstein, but prior to trial, defendants moved to dismiss the indictment principally on the ground of double jeopardy. The judge granted the motion; while his order of January 8, 1973 dismissing the indictment contained no express findings, the bases for the order were carefully stated during the course of the hearing held on the motion. We set these out extensively:

. . . I am particularly impressed with the transcript of October 6, 1972 [the second day of jury deliberation described above] at 5:00 o'clock P.M.

The Court said there is "still disagreement on all but one count." There is no indication that disagreement was fixed or that there could not be some agreement had there been further consultation. There were 18 counts undisposed of at that time. Many of them involved a number of defendants and all of them involved at least two defendants.

The Jury was then polled on Count 20 and the defendant in that count was found not guilty. There's no inquiry made by the Court as to whether the Jury wished to consult further with each other. There is no indication that they disagreed with respect to each defendant on each count. In fact, it is not clear that they had considered in any detail each defendant as to each count.

Immediately after the Jury was polled, the Judge began to address the Jury and there would be nothing from which their counsel could determine the nature of the remarks that would be made up until line 15 of page 6 of the transcript. Then reference is made to the organized crime section of the Department of Justice. Thereafter very quickly there is reference to highly prejudicial material which undoubtedly had taken counsel by surprise and it would be only at that point I would think that the normal practice was not going to be followed, that inquiry was not going to be made to the Jury with respect to whether they might possibly reach an agreement given more time or whether they might possibly reach an agreement on any of the counts as to any of the defendants.

* * *

> I must reluctantly conclude that the Court acted without proper consultation with the attorneys and without proper consultation with the Jury and that the case was improperly taken from the Jury at this point without the consent of the defendants and before it had been determined that no agreement could be reached.
>
> Under the circumstances, therefore I reluctantly find that defendants should be placed in double jeopardy if they were to be tried . . . .

From the subsequent order dismissing the indictment, the Government appeals.[4]

II

At the outset, appellees claim that the Government cannot appeal from Judge Weinstein's order dismissing the indictment on double jeopardy grounds. The 1970 amendments to the Criminal Appeals Act, enacted as Title III, § 14 of the Omnibus Control Act of 1970, P.L. 91-644, 84 Stat. 1880, 1890, 91st Cong., 2d sess., were designed to eliminate much of the tortuous statutory construction, e.g., *United States* v. *Sisson*, 399 U.S. 267 (1970), and *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (9th Cir. 1959) (en banc), to which federal courts had been put in interpreting the coverage of the predecessor act. See S. Rep. No. 91-1296, 91st Cong., 2d sess., at 2 (1970). But a principal purpose of the amendments was to broaden considerably those situations in which the Government could

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4 The statute, 18 U.S.C.A. §3731, provides that:

> The appeal . . . shall be taken within thirty days after the . . . order has been rendered and shall be diligently prosecuted.

The Government's notice of appeal was filed on February 1, 1973, within 30 days of Judge Weinstein's order dated January 8. The Government's brief, however, was not filed until March 12, nearly six weeks after the notice of appeal. In view of the statutory command of diligent prosecution, we believe that the Government's brief in appeals of this sort should ordinarily be filed within 30 days after the notice of appeal. Cf. Local Appellate Rule § 34(f).

appeal. Id. [5] While the predecessor act was to be strictly construed against the Government's right to appeal, e.g., *United States* v. *Sisson*, *supra*, 399 U.S. at 291, the present statute expressly directs that its provisions "shall be liberally construed to effectuate its purposes."

Appellees do not—and cannot—dispute this reading of statutory purpose. They contend, nonetheless, that the plain language of the 1970 amendments forecloses our appellate jurisdiction. Any need to undertake a detailed refutation of this assertion has been obviated by this court's recent opinion in *United States* v. *Castellanos*, slip op. 3285, 3287-88 (2d Cir. May 4, 1973). Like this case, *Castellanos* involved an appeal from an order dismissing an indictment on grounds of double jeopardy prior to the impaneling of a new jury. In holding that order appealable, Judge Smith observed that such an order was plainly appealable under the predecessor statute in light of *United States* v. *Jorn*, 400 U.S. 470 (1971), and that "[n]othing in either the legislative history *or the language* of the new statute . . . indicates the slightest intention to cut back the scope of former § 3731. Indeed, quite the opposite seems true . . . ." (Emphasis added.)[6] The same conclusions govern here.

Appellees further contend, however, that Judge Weinstein's dismissal was, "as a matter of substantive law, tantamount to an acquittal." There is no merit to the argument. *United States* v. *Hill*, 473 F.2d 759 (9th Cir. 1972), on which appellees rely, is not in point. *Hill* involved indictments charging the sending of obscene advertisements through the mail. Defendants' motion to dismiss the indictments was granted on the ground that the advertisements

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5 The amendments also eliminated direct appeals to the Supreme Court, lightening the caseload of the Court. S. Rep., supra, at 13-18.

6 In addition to Judge Smith's persuasive analysis, see S. Rep., supra, at 7-9, 12, which details the reasons for the change in language.

were not obscene as a matter of law. In finding reprosecution prohibited by the double jeopardy guarantee, the court noted that the judge had received evidence limited to a necessary element of the offense; the dismissal thus decided the general issue of guilt and was the equivalent of a directed acquittal. See *United States* v. *Sisson*, supra, 399 U.S. at 290 n.19; *United States* v. *Ponto*, 454 F.2d 657, 663-64 (7th Cir. 1971) (en banc). Judge Weinstein's dismissal, by contrast, in no sense turned on the general issue of guilt or required the taking of evidence remotely related to any element of the crime.[7]

Thus, the Government's appeal is properly before us, and appellees' motion to dismiss the appeal is denied.

III

We turn now to the merits of Judge Weinstein's dismissal order. Plainly, technical jeopardy had attached in the trial before Judge Judd because the jury had been impanelled, but equally plainly, as a century and a half of cases illustrate, that did not end the matter. See *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Illinois* v. *Somerville*, 41 U.S.L.W. 4319, 4320 (U.S. Feb. 27, 1973). What would have ended the matter, however, was defendants' consent to Judge Judd's order declaring a mistrial. See *United States* v. *Gori*, 282 F.2d 43, 47 & n.5 (2d Cir. 1960), aff'd, 367 U.S. 364 (1961); cf. *United States* v. *Jorn*, supra, 400 U.S. at 485. We conclude that defendants did so consent.

On the afternoon of the second day of deliberation, the jury notified Judge Judd that it was "apparently not able to reach a unanimous verdict on any count except number 20"; the judge then gave a modified "Allen charge." De-

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7 Appellees also rely on *United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916), but the case is patently inapposite on its facts and rationale.

fense counsel immediately moved for a mistrial because the jury was hopelessly deadlocked. Had the judge granted this request, of course, no meritorious double jeopardy claim could later have been made. See *United States* v. *Tateo*, 377 U.S. 463, 467 (1964). We are at a loss to understand what transpired thereafter to breathe life into such a claim. Defendants argue that the situation was completely changed less than two hours later by the jury's second note. At that point, according to defendants, counsel realized that they had a favorable jury, that "at worst there would be a hung jury," and that they "decided they did not want a mistrial." [8] The initial problem with this position is that defense counsel did not communicate this change in attitude to Judge Judd. Defendants now argue, as they successfully did before Judge Weinstein, that they never had an effective chance to make their new position known to Judge Judd. We do not understand why that is so, as a recounting of the events of that afternoon indicates.

After the judge read the second note to defense counsel, he stated that this "means a disagreement on seventeen counts. We will bring the Jury in and see." The jury then came back to the courtroom and reported its verdict of not guilty on count 20; each juror was then polled on that verdict. On completion of the polling, the foreman confirmed to the judge that the jury was "in disagreement on the rest of the counts." As anyone familiar with trial court procedure knows, all of this took considerable time. It was certainly sufficient for defense counsel, whose performance up to that time had not been marked by excessive timidity, to make their changed views known to the court. Nor was that all. Judge Judd did not immediately launch into his behind-the-scenes discussion which, defendants correctly maintain, made it impossible for the

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8 Brief for Appellees Goldstein, et al., at 14.

same jury to continue. Instead, the judge took another moment or two in introductory remarks—at which point his intention to order a mistrial became plain—before characterizing the government attorney as "not an ordinary assistant," but from "the section on Organized Crime." This interlude gave defense counsel yet another chance to say that they did not want a mistrial. It is thus apparent to us that defense counsel had adequate opportunity to disabuse the judge of the idea that they still wanted the jury discharged because it was deadlocked; Judge Weinstein's contrary view is not supportable.[9]

Judge Judd obviously assumed that defendants continued to favor mistrial. Certainly, he would not have proceeded as he did had he thought the trial was to continue before the same jury. There was ample warrant for the judge's assumption. Less than two hours before, defense counsel had characterized a proposed instruction to the jury to deliberate "for a couple of more hours" as "incarceration against their will," and had opposed requiring the jury to continue after the weekend recess because "it would be impossible to avoid pollution of the jury." In addition, the judge's assumption as to defen-

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9 Toward the end of the morning session of the hearing, Judge Weinstein stated:

> [A] mistrial was granted here at a time when the defendants . . . would have opposed it had they been given an adequate opportunity to be heard.

In the course of his remarks set forth earlier in this opinion, he again commented that Judge Judd had acted "without proper consultation with the attorneys . . . ." Even if this be a finding of fact, we believe that it must be set aside, regardless of whether the "clearly erroneous" standard applies. We doubt that it does, however. While the "clearly erroneous" standard is applicable to analogous findings in criminal cases, see 8A Moore's Federal Practice ¶ 41.09, at 97, Judge Weinstein's view as to the "opportunity to be heard" turned on his reading of the trial transcripts, and these are as available to us as they were to him. Cf. *In the Matter of Beck Industries, Inc.*, slip op. 3179, 3181 n.3 (2d Cir. April 30, 1973) and authorities there cited.

dants' position was buttressed by common sense. When defendants had earlier moved for a mistrial, they had no way of knowing the jury's vote: It might have been anything from 11-1 for acquittal to 11-1 for conviction. Any one of these possibilities except the last would indicate a jury sentiment more—rather than less—favorable than the 11-1 vote for conviction on all remaining counts revealed by the jury's second note. To all appearance, defendants' position had worsened in the time between the first and second notes. Defendants argued before Judge Weinstein, however, that they were then in a better position because they knew that they could not be hurt, and that

> They could only get a hung jury and it is possible, as it happens in the movies at any rate, that one person can change the minds of eleven other people.

Anything is possible, of course, but the self-serving nature of this hindsight assertion is patent. Moreover, the silence of defense counsel on this issue was even more deafening after Judge Judd had discharged the jury. At that point, defense counsel argued at length that the judge's disclosure of material not in evidence had hopelessly prejudiced defendants, and required dismissal of the indictment. But this claim itself assumed that another trial would be held, a position inconsistent with their present contention that the double jeopardy clause would bar such a trial, because the discharge of the jury had been premature.

We disagree, therefore, with Judge Weinstein's belief that a mistrial was declared without defendants' consent.[10]

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10 Indeed, the record before us is somewhat contradictory as to whether such a finding was in fact made. Judge Weinstein made such a comment at the hearing. On the other hand, in his subsequent order after stating that "the case was improperly taken from the jury," the judge

Consent need not be express, but may be implied from the totality of circumstances attendant on a declaration of mistrial. *United States* v. *Gori*, supra, 282 F.2d at 46; see *Scott* v. *United States*, 202 F.2d 354 (D.C. Cir.), cert. denied, 344 U.S. 879 (1952); cf. *Raslich* v. *Bannan*, 273 F.2d 420 (6th Cir. 1959) (per curiam). Defendants had moved for a mistrial a scant two hours before one was declared, at the first suggestion of jury deadlock; little, if anything, had occurred thereafter to warrant a belief that their position had changed; and even if it had, they failed to make this change in position known to the trial judge notwithstanding adequate opportunity to do so. See *United States* v. *Pappas*, 445 F.2d 1194, 1199-1200 (3d Cir.), cert. denied, 404 U.S. 984 (1971).[11]

Under these circumstances, their consent to mistrial can be properly implied, Judge Judd did not really act sua sponte, and defendants cannot successfully argue double jeopardy.

IV

In what may be an excess of caution, we turn finally to the argument made by the Government that, even if defendants did not consent to the mistrial, reprosecution was consistent with the policies served by the double jeopardy clause.

In deciding to abort a criminal trial short of a verdict and without a defendant's consent, after jeopardy has at-

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deleted additional language proposed by defendants, i.e., that this was "without the consent of the defendants and before it had been determined that no agreement could be reached . . . ."

11 We need not go so far as to hold that in the absence of an express objection to discharging the jury, consent is, in effect, to be presumed, see *United States* v. *Phillips*, 431 F.2d 949 (3d Cir. 1970); we believe instead that the failure to object is one of the several probative factors here from which consent may be implied.

tached, the trial judge is typically afforded "broad discretion," *Illinois* v. *Somerville*, supra, 41 U.S.L.W. at 4321, since he is "best situated intelligently to make such a decision," *Gori* v. *United States*, 367 U.S. 364, 368 (1961). On the other hand, it is recognized that the double jeopardy clause of the fifth amendment safeguards the defendant's "valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949), which "he might believe to be favorably disposed to his fate," *United States* v. *Jorn*, supra, 400 U.S. at 486. With due regard for this right, as well as for other defendant interests served by the double jeopardy clause, see Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272, 1274 (1964), the Supreme Court has limited that discretion and has occasionally held a second prosecution barred where a trial judge sua sponte and mistakenly had declared a mistrial. See *United States* v. *Jorn*, supra; *Downum* v. *United States*, 372 U.S. 734 (1963). In defining standards for the exercise of discretion in this sort of case, the Court has continually adhered to the formulation of Justice Story in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824):

> [T]he law has invested Courts of justice with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated.

Beyond these general guidelines, the Court has emphasized each case must turn on its own facts. E.g., *Illinois* v. *Somerville*, supra, 41 U.S.L.W. at 4321.

Turning to the facts in this case, *Perez* itself and *Logan* v. *United States*, 144 U.S. 263, 297-98 (1892), among others, establish that a jury's genuine inability to agree on a

verdict constitutes "manifest necessity" warranting the declaration of a mistrial. See *United States* v. *Lansdown*, 460 F.2d 164, 168 (4th Cir. 1972). Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts. On this view of the case, the only question presented to us, therefore, is whether Judge Judd abused his discretion in concluding when he did that the jury was in fact genuinely hung.

The question is a close one. Judge Weinstein believed that Judge Judd had erred because the trial had been lengthy; the evidence and factual issues were complex, as demonstrated by the jury's request to have the charge reread; the jury had only deliberated eight hours even though there were almost 50 possible verdicts to render and no indication that agreement was impossible as to all. Finally, Judge Weinstein felt that no sufficiently in-depth attempts had been made, in accord with "the normal practice," to ascertain the scope of disagreement among jurors, or to determine whether further deliberation might produce some agreement. These are appropriate factors to consider. See ABA, Project on Minimum Standards for Criminal Justice, Trial by Jury § 5.4(c); (approved draft 1968); id. at 156-57.

Nonetheless, "taking all the circumstances into consideration," as *Perez* requires, we are left with the firm conviction that Judge Judd committed no error. The complexity of a case and the amount of time requested by 12 reasonable jurors to reach unanimity on some or all of many possible verdicts are determinations best left to a trial judge and are difficult to gauge by another district judge or by appellate judges on a cold record. The jury twice reported itself unable to agree—in the second instance, less

than two hours after the first and after a modified Allen charge in which the judge had instructed the jury to tell him "whether further deliberation would be useful." The second note itself appears to answer the question in the negative and suggests growing frustration on the part of the jurors. Indeed, the second note and final oral response of the jury foreman were unequivocal in tone: Mrs. Rappaport could vote guilty "under no circumstances" and it was "clear" that they were in disagreement on all counts. With the dissenting juror so identified, Judge Judd was entitled to recall his conversation with her on the previous evening, and to conclude that her previously vague reference to feeling "incapable" meant that she was in fact unable or unwilling to vote guilty.

Appellees call our attention to but one case in which the trial court's erroneous decision to order mistrial due to an apparently hung jury has been held to bar reprosecution. *United States* v. *Lansdown*, supra. Our research has disclosed no other federal case. But cf. *Commonwealth* v. *Baker*, 196 A.2d 382 (Pa. 1964) (premature discharge of jury bars retrial on state constitution double jeopardy ground). This itself suggests how rarely the informed judgment of a trial court is disturbed in these or similar circumstances. Moreover, factual differences between this case and *Lansdown* are striking. In *Lansdown*, the trial judge ordered a mistrial solely because he felt that the many hours of jury deliberation after a one-day trial had been long enough.[12] The court of appeals noted that no rule of thumb in terms of hours deliberated could be extrapolated from precedent. 460 F.2d at 169 & n.2. Of far more significance, however, the jury foreman had told the *Lansdown* trial judge, immediately before mistrial was

12 The trial judge referred to "20 hours" of deliberation. The court of appeals pointed out, "In fact, the jury had deliberated slightly in excess of 11 hours." 460 F.2d at 168 n.1.

declared, that they were "on the verge" of a verdict; another juror took it upon himself to request an additional ten minutes of deliberations. In light of this, the trial judge's action was arbitrary and manifestly an abuse of discretion. In this case, on the other hand, no member of the jury ever suggested that any verdict was remotely possible. We believe that Judge Judd could have reasonably concluded that the jury was hopelessly deadlocked.[13] If so, it follows that there was manifest necessity for declaring a mistrial and that doing so was not an abuse of discretion.

Reversed and remanded for further proceedings consistent with this opinion.

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13 Cf. the standard proposed by § 5.4(c) of the ABA Minimum Standards, supra, defining the scope of a trial judge's discretion to declare a mistrial sua sponte:

> The jury may be discharged without having agreed upon a verdict if it appears that *there is no reasonable probability of agreement.*

(Emphasis added.)